# BOOK REVIEWS

**Restatement of the Law of Torts.** St. Paul: American Law Institute Publishers, 1934, 2 Vols., pp. xxxii, 730; xxxi, 1338. $12.00.

Two long months of consistent reading had brought me to the Comment on § 433 of the Restatement. I had striven that not a word nor a definition nor a distinction should escape me, and my mind was weary with words, definitions and distinctions. To my annotations of the Sections, the Caveats and the Comments there seemed no end. I was surfeited with the ingenuity of my own criticisms, with the "cfs." to cases I recalled, until my understanding became blunted and declined to be used any longer as a mere tool for my pencil. I fell to dreaming. . . . . The words, definitions, distinctions and criticisms fell from off my mind like dry leaves scattered by a sudden breeze. . . . . I wondered what the Restatement would look like from above, to one who saw more than its details, to one who had a sense of its significance in time and not merely in logic . . . . I wondered what a legal giant like Savigny[1] would think of it, and as I wondered I must have formulated my question in words, for a voice answered me—the voice of an old man, quietly but insistently earnest. . . .

"It is a grave question to put to one who has always believed that the epochs are rare in which the developing spirit of the people may be transformed into the *ipse dixit* of a few human minds." The venerable spirit of Savigny looked thoughtfully, and a little sadly, at Volumes I and II of the Restatement of the Law of Torts which lay open before him. "You ask me whether in the light of my experience and my observation of the course of legal development, I think that the American Law Institute is engaged in a task which will advance that great emanation of your people's *Geist* or whether it will hinder it. You ask me to answer this in the light of the learned tomes on the law of delicts written by your Bohlens, your Seaveys, your Thurstons, and your Harpers.

"My answer cannot be a simple yes or no. Too many elements are involved, and the potentialities and dangers of such a program are too formidable to permit any element to be ignored. You must therefore have the patience to hear me.

"One at least of the demands I made for my beloved country long ago I see fulfilled in the America of your times. In 1814 I exhorted my countrymen never to forget that a code, though *put into force* by political authority, must be the work of individual jurists to whom a people have yielded power to declare their innermost convictions; to the learned men in whose bosoms the law in our modern societies has a considerable part of its being. I pleaded with them to understand that only in an age when learning flourishes in the fertile soil of a rich tradition can a people find such men to set down its laws. I see my exhortation and my pleading answered in the common law of your times, as I rejoiced to see them answered in the delay of our German Civil Code until a generation after my departure. For your Restatement comes in the century after

[1] Friedrich Carl von Savigny (1779–1861) the great historical jurist whose "On the Vocation of our Age for Legislation and Jurisprudence," written in 1814, had the effect of postponing codification of German law for three quarters of a century. Meanwhile his labors and those of the men he inspired prepared the way for the ultimate success of German codification.

the labors of Story, Gray, Ames, Thayer, of Austin, Maine, Vinogradoff and Dicey, of some of the greatest judges with whom you have been blessed, and of a host of others who have striven to give to the common law a healthy basis of history and construction. Even so did our German Code follow the labors of my disciples in the history of our law, and of men like my good friends Dernburg and Windscheid in its systematic elaboration.

"I consider, therefore, that juristically the time is ripe for the heavy task of restating the common law of torts. But is the time ripe politically? I desire you to understand clearly what I mean by this. I am asking whether your people cherishes any body of convictions about this branch of the law which your jurists can set down? I said long ago and I say again with no fear that, even today, it is superfluous:

> " 'If at any time a decided and commendable tendency be distinguished in the public mind, this may be preserved and confirmed, but it cannot be produced, by legislation; and where it is altogether wanting, every attempt that may be made to establish an exhaustive system of legislation, will but increase the existing uncertainty and add to the difficulties of the cure.'[2]

As I look down upon your country from the peacefulness of my abode I see only a violent conflict of convictions, an unspeakable confusion of beliefs and an impotence of that common consciousness which alone can ground a people's law. The confusion of the lawyers is but a reflection of the confusion of the people. The jurist can give system and technique; he cannot create what it is his task simply to express.

"In this fundamental branch of the law which you call torts, more than in any other, no principles can prevail which have not behind them the inspiration of the great organic society the daily conduct of whose members it seeks to order. When the American Law Institute observes that 'the growing complication of economic and other conditions of modern life are rapidly increasing the law's uncertainty and lack of clarity[3] they should understand from this how very necessary it is to beware lest at the beginning of a period of growth and change the uncertainties of the future be put in fetters to the certainties of the past and the present.

"One peril at least I am happy to see that they have avoided. Their ambition is not that of the obscurantist century of juristic life which preceded my own, namely, to give to their exposition of existing law the force of statute. In this I see great wisdom, and even greater wisdom in the encouragement which you tell me they are giving to the state annotations. If I understand you aright these annotations will suffuse the anæmic and colorless test of the Restatement with the experience of the courts and of the juristic doctrine of the people of each state. It will insure that thought is not made barren by words behind which it is forbidden to go. Thus, perchance the experience of the past will be preserved and carried over to the tasks of the future. Not such was the happily abortive proposal of my friend Thibaut. *He* would have had us enact a code for all the German states at a time when our juristic skill and knowledge was at its lowest and would have cut off the law from all that had gone before. *He* would have had each of the *Lände* abandon the wisdom of its own peculiar history, and live as if it had been re-born with a new *Geist* when the Code was enacted.

[2] Savigny, "Von Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft," transl. by Hayward, p. 63.

[3] Restatement of the Law of Torts, Vol. I, p. ix.

"Yet recognizing all this I am fearful of your future if the Restatement of Torts should command the influence and power to which it aspires. For I read that 'the object of the Institute is accomplished insofar as the legal profession accepts the Restatement as *prima facie* a correct statement of the general law of the United States.'[4] My apprehensions are two-fold. The first I have already voiced, namely, that the American people and all that goes to make up their civilization are at present at the beginning of a period of rapid transformation—in other words there is lacking any unity of consciousness capable of effective expression in words. As a result the draftsmen have had the ordeal of navigating between the Scylla of premature and therefore incomplete restatement, and the Charybdis of inexperienced speculation. On the one hand, if the law of torts thus restated represents only that part of the law which is today settled, then, unless its indefinitiveness be open and acknowledged, it will operate as a check upon healthy development of those matters now formative. On the other hand, if it purports also to fix a rule for those matters as yet unsettled, its solutions must inevitably lack the wisdom which experience would have supplied had the law been left to its untrammeled unfolding.

"Upon such a voyage as that I myself would dread to embark. If compelled to do so, however, I could see only one safe course to navigate. Perceiving the central difficulty of any attempt, at this time, to restate the law of torts, I would have sensed that the less detailed, the more all-pervading, and the fewer its provisions the better. Yet in examining the five hundred and three sections of the work, my apprehensions have only been converted into despair. Here are no such broad principles of liability as those (despite its faults) of the French Civil Code, and of those of the German Civil Code. On the contrary, here are drawn together on a basis of undiscriminating equality principles of the first magnitude, mere corollaries and petty corollaries of corollaries, which should have been left to the state annotations, to be furnished by local experience. What is worse, I find that the comments instead of being directed solely to reasoned discussion frequently contain principles of at least equal importance to the corollaries of the first rank.

"This, however, is but a small part of the difficulties of technique and form which to my grief the Restatement of Torts displays. A detailed exposition with a rule supplied for all cases that may conceivably arise (I cannot but acknowledge with gratitude the two-edged modesty of a limited number of caveats, two-edged since they imply that the draftsmen think they were at least aware of all the problems which they did not solve) might claim as a virtue that at any rate it provides some sort of assured rule, albeit a bad one, for the future. Not so in the Restatement, however, for I find that in a vast number of sections the application of the apparently detailed rule is rendered uncertain by the insertion of what we civil lawyers call "lenient" qualifications, such as references to "reasonableness." It is easy to see the consequence of this. In so far as the Restatement is followed even as "*prima facie* a correct" proposition of law, courts and jurists will have to struggle to attach their particular decision to one of its detailed provisions without the compensation of a facile solution once they have done this. Yet if such must be the situation, would it not have been better to have formulated only the fundamental axioms of this branch of the law, and left its details to time and experience?

"But you tell me that the draftsmen have sought to meet this difficulty in advance

[4] *Ibid.*

by analyzing in the comments the factors which ought to be considered in determining whether in any specific detailed situation the test of reasonableness is met. Alas! that after the repeated experiences of history, that in the presence of the accumulated demonstration of jurists and legal philosophers, men should still believe that they can tie down the unseen future of the people by reference to what knowledge they have acquired, and what imagination they have developed in the course of their single lives. Even were the political element of legislation settled such a technique would be fatal. How much more so when you are dealing with the life process of a great people whose character is still formative.

"As I contemplate what an eminent Anglo-Saxon has termed the most carefully considered statement of a nation's law ever made, I mean the Civil Code of my Fatherland, when I ask myself how much of the riches which it contained at its promulgation in 1896 would have been irretrievably lost had Thibaut had his way in 1814, I measure to myself the perils for the American law of torts involved in this phenomenally meticulous Restatement. The tremendous learning, the powerful analysis, the unbelievable patience with detail, the wonderful play of imagination on hypothetical cases, combined with a complete unawareness of the lessons of legal history, and but a thin veneer of the lessons of legal philosophy, have reared a structure which cannot help but become rapidly obsolete. It will become a magnificent memorial to the faith of the living in their power to bury the dead, to the blindness of even the most cultivated minds, which cannot see that the living live only through the dead, and those yet unborn through those now living, and that it is as great a folly for the living to make minute dispositions for the world of the unborn, as it would have been for the dead to make minute dispositions for the world you now live in. For it is not the mere absence of potentialities for good which saddens me. I would say to you as I said to my countrymen 121 years ago: 'In your time vigorous developments are undeniably in the making, and it is impossible to say how much good you will detract from the future by confirming your present deficiencies. For *ut corporalente augescunt, cito extinguuntur; sic ingenia studiaque oppresseris facilius quam revocaveris.*' "[5]

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Trusts and Trustees. By George Gleason Bogert. St. Paul: West Publishing Co., 1935. 7 Vols., pp. xi, 3734, 867. $50.00.

Such familiarity with the standard text-books as the reviewer has been able to accumulate in twenty years of use, and with this set of volumes in about as many hours, leads him to the present conviction that Professor Bogert has produced the best text-book in existence on this most complex of subjects. Furthermore, unless this reviewer is greatly mistaken, this set deserves to rank with the text-books of Wigmore and Williston as potential aids to the profession.

The bulk of a seven volume set is rather appalling—especially to a reviewer. Four of these volumes are text material; two of them consist of forms and the last is a table of cases and an index—which the preface correctly states to be "extremely detailed" and significantly points out to have been "prepared by the author." Therein lies a far

[5] Savigny, "Von Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft" (3d ed 1840), 52.